LOKE POH SIANG v. PUBLIC PROSECUTOR

[A. Cr. J. (Hill J.) September 1, 1956]

[Alor Star — Criminal Appeal No. 39 of 1956]

Criminal Procedure Code (Cap. 6), ss. 173 and 425 — Whether Magistrate can call a witness after the prosecution has closed its case.

In this case the appellant was charged with contravening sections 13(1) and 14(1) of the Rubber Supervision Enactment. At the close of the case for the prosecution, Counsel for the defence submitted that as no evidence had been called to show that the appellant was a licensed rubber dealer he should be acquitted. The learned President then decided to call the clerk in charge of the Rubber Licensing Board and adjourned the case. Subsequently the licensing clerk was called, the defence was heard and the appellant was convicted and fined. On the appeal it was argued that as no *prima facie* case had been made out against the appellant when the prosecution case was closed, he was entitled to be acquitted in accordance with the provisions of section 173 (f) of the Criminal Procedure Code and that it was improper at that stage to invoke section 425 of the Code.

Held: the Court has an absolute discretion in recalling or calling a witness after the close of the prosecution case to rectify an omission in the prosecution evidence and that in this case the learned President exercised his discretion judicially and properly.

Cases referred to :—

(1) *R. v. Day* (1940) 1 All E.R. 402.

(2) *R. v. Bakar* (1951) M.L.J. 202.

(3) *R. v. McKenna* (1956) Cr. L.R. 327.

(4) *R. v. Jackson* 14 Cr. App. R. 41.

(5) *Cher Tiam Seng v. Public Prosecutor* (Raub — Cr. App. No. 6 of 1953 — unreported).

MAGISTRATE'S CRIMINAL APPEAL.

Lim Cheng Poh for the appellant.

B. Sheldon (Federal Counsel) for the respondent.

Hill J. : — The appellant was convicted in the Sungei Patani Sessions Court on two charges contravening sections 13(1) and 14(1) of the Rubber Supervision Enactment No. 103 (Kedah).

The main and indeed the only ground of appeal that I need consider is that set out in paragraph 3 (b) & (c) in the Petition of Appeal as follows :—

"That at the conclusion of the case for the prosecution the Learned President should have acquitted and discharged the Appellant as the Prosecution failed to establish a *prima facie* case against the Appellant.

The Learned President was wrong in stating that 'Having satisfied myself that Prosecution had made out a *prima facie* case, I then exercised my discretion under the first part of Section 425 of the Criminal Procedure Code and required the Licensing Authority to send the Officer-in-charge of the Licences to give evidence". The President held that the Prosecution had established a *prima facie* case only after the Court Witness No. 1 Zakir bin Abdullah had given his evidence. In fact the Learned President called Court Witness No. 1 Zakir bin Abdullah as a witness to supplement the case for the Prosecution so as to establish a *prima facie* case against the Appellant."

The record shews that when the prosecution case was closed counsel for the appellant submitted :—

"No evidence before Court to prove that Accused 1 a 'licensed rubber dealer' — Licence should have to be produced or licensing officer called by prosecution. Exhibit P1 makes no mention of Loke Poh Siang. Asks that Accused 1 be acquitted and discharged."

The learned President decided to call as a witness the clerk in charge of the Rubber Licensing Board and this was done.

An adjournment was granted the defence and on a later date the licensing clerk was cross-examined, the defence heard and the appellant convicted and fined.

Mr. Lim Cheng Poh for the appellant argued that as no *prima facie* case had been made out against his client when the prosecution case was closed he was entitled to be acquitted in accordance with section 173 (f) of the Criminal Procedure Code and that to invoke section 425 of that Code as was done was improper. In support of his argument Mr. Lim Cheng Poh referred me to the decision in *R. v. Day*[1] and to the *dicta* of Spenser Wilkinson J. in *R. v. Bakar*[2]

R. v. Day[1] and the other decisions therein referred to deal exclusively with the question of witnesses being called *after* the defence has been given. A very different situation to that arising in the trial under review and the question for consideration is whether the principles laid down in *R. v. Day*[1] should be applied.

Mr. Sheldon referred me to two decisions of the Court of Criminal Appeal in *R. v. McKenna*[3] and *R. v. Jackson*[4], and an unreported decision by Mathew C.J., in Raub Criminal Appeal No. 6 of 1953 *Cher Tiam Seng v. Public Prosecutor*[5].

These three decisions remove any doubt there may be about the absolute discretion a Court enjoys in re-calling or calling a witness after the close of the prosecution case to rectify an omission in the prosecution evidence. Indeed, the generally accepted view in my experience has been that it is the duty of a Magistrate to call a witness in such circumstances.

Whenever it is at all likely by adopting such a course that the defence is being taken by surprise or placed in any real difficulty an adequate adjournment should, of course, be granted.

I cannot agree that section 173 (f) of the Criminal Procedure Code can be construed as in any way fettering a Magistrate in the exercise of this discretion even without taking into consideration the specific authority conveyed by miscellaneous section 425 of the Code.

I hold therefore in this appeal that the President exercised his discretion judicially and properly and that the appellant was subsequently rightly convicted.

The appeal is accordingly dismissed.

Appeal dismissed.

Solicitors : *Pillai, Lim, Lee & Hwang.*